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From:

Sent: Friday, July 19, 2013 3:07:52 PM

To:

Cc:

Subject: Third party contacts

Below are responses provided by regarding third party contacts.

From:

Sent: Thursday, July 18, 2013 5:12 PM

To:

Cc:

Subject: RE: Form 12175 Questions

Hi

Below is our response to the questions you posed to us. If you have further questions, please feel free to call me to discuss.

1) What kind of third party contacts must IRS personnel report on a Form 12175? Are there any contacts that do not need to be reported on Form 12175?

In general, all third-party contacts must be reported on Form 12175. A third-party contact is defined as a "communication which (1) is initiated by an IRS employee; (2) is made to a person other than the taxpayer; (3) is made with respect to the determination or collection of the tax liability of such taxpayer; (4) discloses the identity of the taxpayer being investigated; and (5) discloses the association of the IRS employee with the IRS." Treas. Reg. § 301.7602-2(b). Section 7602(c) does provide four exceptions, however. Contacts are not considered reportable third-party contacts where the taxpayer has authorized the contact, where providing notice of the contact would jeopardize the collection of any tax, where the person contacted fears reprisal, and where the contact is made with respect to any criminal investigation. I.R.C. § 7602(c)(3). Further, there are three non-statutory exceptions. Contacts regarding an issue or matter in litigation, contacts made to an expert or consultant hired by the IRS, and contacts with government officials for information generally available to the public are all excepted from the third-party

notice requirements. See Treas. Reg. § 301.7602-2(f)(7) (litigation contacts); (c)(1)(B) (experts subject to disclosure restrictions pursuant to a written agreement); (f)(5) (government officials for publically available information).

Where the contact need not be reported, due to an exception, there are a number of procedures to follow. In some cases, such as the criminal investigation exception, the IRS does not fill out form 12175. In other cases, such as jeopardy, the form is filled out, but not forwarded to the Third-Party Contact Coordinator until the jeopardy situation no longer exists. Please see IRM 4.11.57.4.2 for complete details.

Where the IRS issues a third-party summons, providing the taxpayer with proper notice of the summons satisfies section 7602(c). See Treas. Reg. § 301.7602-2(e)(3); Anderson v. United States Internal Revenue Service, No. MC 12-12-BLG-CSO, 2013 WL 1747796, at *5 (D. Mont. April 23, 2013). Thus, while issuing a third-party summons is a third-party contact, the Revenue Agent need not record the summons on Form 12175. IRM 4.11.57.5.1(1).

2) Is there a substance test for third party contacts? For example, if a Revenue Agent contacts a third party merely to schedule a meeting, must that phone call be reported? Must text messages with third party contacts be reported?

There is no substance test, per se, for third-party contacts. However, as noted above, for a contact to be considered a third-party contact, the contact must be made "with respect to the determination or collection of the tax liability of such taxpayer." Treas. Reg. § 301.7602-2(b)(3). It is possible that a contact where the RA merely schedules a meeting would be a third-party contact because scheduling the meeting could be seen as an "administrative action to ascertain the correctness of a return." See Treas. Reg. § 301.7602-2(c)(3)(B). Nevertheless, there are no reported cases construing the language of this portion of the regulation, so it is difficult to say whether a court might take a narrow or wide view of the phrase "administrative action." The safest approach is to include non-substantive contacts.

A text message is a form of contact and, therefore, would fall within the third-party contact rules.

3) _____ ; who is responsible for making sure each contact was properly logged?

In general, the employee who makes the third-party contact is responsible for ensuring that the contact is properly logged. IRM 4.11.57.4.3(3).

4) What processes does the IRS have in place to ensure that third party contacts are being properly reported?

- it seems that the client is in a better position to answer this question than we are. Neither the statute nor the regulations set forth a review process. There are Third-Party Contact Coordinators in each office who should be able to assist.

5) Practically speaking, what happens if a Revenue Agent or Officer forgets to complete a Form 12175?

As a practical matter, if a Revenue Agent or Officer forgets to complete Form 12175, they should complete the form as soon as possible. There is no independent cause of action for violating third-party contact rules. As far as we are aware, the IRS has never been sued for violating the third-party contact rules, though taxpayers have occasionally attempted to assert these types of violations as a defense to summons enforcement or collection actions. In theory, a violation of section 7602(c) might support a suit by a taxpayer against the IRS under section 7433. However, section 7433 only allows a taxpayer to

recover actual, direct economic damages and court costs. It is unclear what actual, direct economic damage a taxpayer would suffer as a result of a violation of section 7602(c).

6) Is any part of this process automated from the IRS's ICS History?

- we will defer on this question to you and the client.

7) If our case was directed to a corporation rather than an individual, would we still be required to comply with 7206(c)?

We assume that "7206(c)" is a typo and that the question refers to section 7602(c). This section applies to corporations as well as individuals. Section 7602(c) provides for notice to "taxpayers." Taxpayers are defined as "any person subject to any internal revenue tax." I.R.C. § 7701(a)(14). Person is defined as including corporations. I.R.C. § 7701(a)(1). We also note that a number of the examples in the regulations under section 7602(c) refer to businesses.

8) What happens if the IRS contacts a third-party during a parallel investigation? For example, if the IRS is investigation potential penalty conduct for Person A, and also investigating a business associate, Person B for related penalty conduct, are the IRS's third party contacts in the parallel investigation of Person B reported to Person A? What if a third party sits for an interview with the IRS in which they discuss potential penalty conduct by two different people; how is that reported?

In this situation, the contact is only a third-party contact with regards to Person A. The regulations explicitly state, "While a contact made for the purpose of determining a particular taxpayer's tax liability may also affect the tax liability of one or more other taxpayers, such contact is not for that reason alone a contact 'with respect to' the determination or collection of those other taxpayers' tax liabilities." Treas. Reg. § 301.7602-2(c)(3)(A); see also Treas. Reg. § 301.7602-2(c)(3)(D)(ii) Example 1.

If the IRS asks a third-party to an interview to discuss Person A and the witness discusses Person A and B, this remains a third-party contact only with regards to Person A, so long as the purpose of the contact was an investigation of Person A. See Treas. Reg. § 301.7602-2(c)(3)(D)(ii) Example 2.

9) What happens if a third party is not asked during the initial interview about the fear of reprisal, but later comes to the IRS (or the DOJ) and expresses concerns? Can the Service retroactively flag a third party contact as fearing reprisal? Once a third party contact expresses fear of reprisal, is that contact always shielded from disclosure, even in future contacts?

We first note that the IRS should be asking, at the initial interview, whether the third-party witness fears reprisal. IRM 4.11.57.4.2.3(4). Should a third-party witness, after the initial interview, state that they now fear reprisal, nothing in the statute or regulations would prevent the IRS from retroactively flagging the contact as fearing reprisal, though we are not aware of any procedure in the IRM for doing so.

Once a third-party witness states that they fear reprisal from a particular taxpayer, then contacts of that witness with regards to that particular taxpayer are shielded. Nevertheless, further contacts must be documented as set forth in IRM 4.11.57.4.2.3(2). Further, should that witness be contacted regarding a different taxpayer, the IRS ought to make a new reprisal determination, though the IRS may consider case history in making that determination. IRM 4.11.57.4.2.3(6).